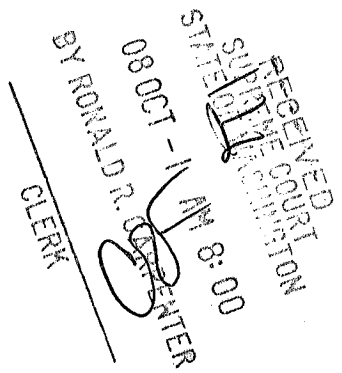

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of JAMES T. EASTMOND , Petitioner.	No. 81939-4 RESPONSE TO PERSONAL RESTRAINT PETITION

I. AUTHORITY FOR RESTRAINT OF PETITIONER

The petitioner, James T. Eastmond, is restrained pursuant to the judgment and sentence of Snohomish County cause no. 00-1-00227-5 for first degree robbery with a firearm enhancement and first degree burglary with a firearm enhancement. A copy of the judgment is attached to the personal restraint petition as Appendix 9. Copies are also on file with this Court in petitioner's direct appeal on re-sentencing, Cause No. 76777-7.

II. RESPONSE TO PETITIONER'S CLAIMED GROUNDS FOR RELIEF

1. Firearm enhancements. Petitioner has not shown that he suffered any prejudice from instructional error and error in the special verdict form.

2. Only sentenced for one crime. A finding that two crimes constitute the same criminal conduct is not a finding that the crimes merge or violate double jeopardy. Here,

petitioner was sentenced for both crimes. An enhancement for each crime, to be served consecutively to each other and the bases sentence, was mandatory.

III. STATEMENT OF THE CASE

On November 17, 2000, a jury convicted petitioner of first degree robbery and first degree burglary. The evidence included testimony from one of the first responding officers that he saw two bullet holes in the wall of the upstairs hallway in the victim's house. 11/13 RP 36.[1] The victim testified that as he was swinging a sword at one of the robbers, a second robber fired "two rounds" inside his house. 11/14 RP 298.

Included in each count of the indictment was the phrase, "at the time of the commission of the crime, the defendant or an accomplice was armed with a firearm, as provided and defined in RCW 9.94A.310, RCW 9.41.010, and RCW 9.94A.125[.]" 1 2001 CP 99.[2] In instructing the jury, the court said:

> For the purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime in Counts I and II.
>
> A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.
>
> If one participant in a crime is armed with a deadly weapon, all accomplices to that participant are deemed to be so armed, even if only one deadly weapon is involved.

1 2001 CP 56.

In addition to convicting petitioner of robbery and burglary, the jury found as to each count, petitioner was armed with a deadly weapon. 1 2001 CP 36, 35.

The court found the burglary and robbery were the same criminal conduct, but mistakenly believed that the burglary anti-merger statute prohibited it from making that

[1] The report of proceedings are on file in Cause No. 73709-6

finding. The court sentenced petitioner to 61 months for the robbery and 41 months for the burglary. It further imposed one firearm enhancement, but ran it concurrently with the sentence for burglary, resulting in a sentence of 121 months confinement. 1/30 RP 786, 790-91.

The Court of Appeals held that "the trial court erred when it failed to impose the two firearm enhancements consecutively to the underlying base sentences and each other." State v. Eastmond, No. 48151-7-I, slip op. 1. The Court of Appeals reversed the sentence and remanded for re-sentencing. Id. 21. This Court denied review. Cause No. 73709-6, 149 Wn.2d 1036 (2003).

On re-sentencing, the court found that the robbery and burglary were the same criminal conduct. 1/16 RP 14. It declined to apply anti-merger. 1 2004 CP 8, 1/16 RP 16. The court sentenced petitioner to a standard range sentence of 36 months for robbery and 21 months for burglary, to run concurrently. The court also imposed two 60 month firearm enhancements, to be served consecutively to each other and the sentence for robbery. The total confinement was 156 months. 1 2004 CP 11, 1/16 RP 17.

The Court of Appeals affirmed petitioner's judgment and sentence. No. 53836-5-I. Petitioner petitioned this Court for review. No. 76777-7. While a decision was pending on that petition, this Court decided State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005) (Recuenco I); reversed in part and remanded, 548 U.S. 212 (2006) (Recuenco II); affirmed, 163 Wn.2d 428, 180 P.3d 1276 (2008) (Recuenco III). This Court granted petitioner's motion to file a Supplemental Brief raising Recuenco issues.

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[2] The clerk's papers from petitioner's first direct appeal are on file with this Court in Cause No. 73709-6. They are referred to as 2001 CP.

On October 2, 2007, this Court denied review. 161 Wn.2d 1015. The mandate was issued on November 16, 2007.

On July 31, 2008, petitioner filed the instant personal restraint petition. Petitioner moved to consolidate his petition with the case of State v. Mandanas, No. 80441-9. On August 4, 2008, this Court denied the motion to consolidate and invited a response to the petition.

IV. STATEMENT OF DISPUTED FACTS

There are no material disputed facts.

V. ARGUMENT

A. INTRODUCTION.

The errors that occurred here were (1) the court improperly instructed the jury on which enhancement was charged and proved, and (2) the court gave the jury a special verdict form that misidentified the enhancement. To be entitled to relief, petitioner must show that, but for these errors, the outcome would have been different. Here, whether petitioner's accomplice was armed with a firearm was uncontested, and whether the firearm was operable was uncontested. Petitioner can not show that the jury would not have found petitioner was armed with a firearm had it been properly instructed and had a correct special verdict form.

If the errors, were not harmless, the proper remedy is to remand for re-sentencing, with the court having authority to empanel a jury to determine the proper enhancement.

When felonies are found to be the same criminal conduct, the court must still sentence the defendant for each felony. Hence, when the defendant or an accomplice

was armed when committing multiple felonies, the court must impose a separate enhancement on the sentence for each felony.

This Court is considering whether the imposition of two firearm enhancements violate double jeopardy where the underlying crimes are found to be the same criminal conduct in Mandanas. Resolution of any double jeopardy issue here will be controlled by this Court's decision in Mandanas. The State incorporates the arguments it made there.

B. THE STANDARD OF REVIEW IS DE NOVO.

An error that deprived a defendant of his or her constitutional right to a jury trial, as defined by Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), is reviewed de novo, as are issues of double jeopardy and whether the trial court misconstrued a statute. State v. Bradshaw, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004), cert. denied, 544 U.S. 922 (2005) (statutory construction and constitutional issues are reviewed de novo). Petitioner has the burden of showing that he was actually prejudiced by the errors in instructions and in the special verdict form. In re Rice, 118 Wn.2d 876, 884, 828 P.2d 1086, cert. denied, 506 U.S. 958 (1992). If petitioner does not make that showing, this Petition must be dismissed. In re Grisby, 121 Wn.2d 419, 423, 853 P.2d 901 (1993).

C. PETITIONER CAN NOT SHOW THAT HE SUFFERED PREJUDICE FROM THE ERRORS IN IMPOSING A FIREARM ENHANCEMENT.

The errors here were (1) not instructing the jury that it was to determine if petitioner was armed with a firearm when he committed his crimes, and (2) a special verdict form that asked the jury to determine if petitioner was armed with a deadly weapon. Petitioner was charged with being armed with a firearm. Petitioner

acknowledged that he was facing firearm enhancements, so he cannot claim that he did not know he had to prepare to defend against the firearm enhancements.

Where a court commits a Blakely error, a reviewing court must apply a constitutional harmless error analysis. Recuenco II, 548 U.S. at 222; State v. Womac, 160 Wn.2d 643, 661, 160 P.3d 40 (2007). "When applied to an element omitted from, or misstated in , a jury instruction, the error is harmless if that element is supported by uncontroverted evidence." State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002), State v. Berube, 150 Wn.2d 498, 506, 79 P.3d 1144 (2003), or, as phrased by the United States Supreme Court:

> [W]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless.

Neder v. United States, 527 U.S. 1, 17, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

Since this error is raised in a personal restraint petition, the burden is on petitioner to show that he was actually prejudiced by the asserted error. Rice, 118 Wn.2d at 884. As applied here, that requires petitioner to show that the jury would not have found an accomplice was armed with a firearm at the time petitioner committed the burglary and robbery.

Here, the uncontroverted evidence was that one of petitioner's accomplices was armed with an SKS assault rifle belonging to petitioner. The accomplice fired rounds from the rifle into a wall in the victim's house. 11/13 RP 36, 11/14 RP 298, Eastmond, No. 48151-7-I, slip op. at 4. Petitioner can not demonstrate that the jury would not have unanimously found beyond a reasonable doubt that petitioner or an accomplice was

armed with a firearm. This Court should conclude that petitioner has not met his burden and dismiss this Petition.

Petitioner argues that resolution of this issue is controlled by Recuenco. He is wrong. Petitioner asserted that "[l]ike the information in Recuenco, the notice of the charged offense stated that the State was relying on both the deadly weapon enhancement and the firearm enhancement." Petition 5. This is incorrect as to both cases.

Mr. Recuenco was charged with second degree assault while "armed with a deadly weapon, to wit: a handgun." Recuecno I, 154 Wn.2d at 159. As this Court found, "the information did not contain an allegation that a firearm enhancement applied[.]" Recuenco III, 163 Wn.2d at 432.

Here, both counts clearly alleged that defendant or an accomplice was armed with a firearm. The deadly weapon language came only from the elements of first degree burglary and first degree robbery, not from the enhancement. 1 2001 CP 99, 50, 55.

Further, in response to a request by Mr. Recuenco to define a firearm in the instructions, the State specifically informed the court "the method under which the State is alleging and the jury found the assaults committed was by use of a deadly weapon . . . in the crime charged and the enhancement the State alleged, there is no element of a firearm." Recuenco I, 154 Wn.2d at 160. Here, there were no statements by the State that it was seeking deadly weapon enhancements, not firearm enhancements. In addressing sentencing, defendant repeatedly told the court he was facing firearm enhancements.

Last, there was no evidence in Recuenco that the handgun Mr. Recuenco used to assault his wife was operable. Recuenco III, 163 Wn.2d at 437. Here, the evidence was that the accomplice who had the firearm actually fired it into a wall in the victim's house. When it is undisputed that a real gun was used and shots are fired, a failure to instruct that the jury must find the firearm operable is harmless beyond a reasonable doubt. State v. Hall, 95 Wn.2d 536, 540-41, 627 P.2d 101 (1981).

The prejudice in Recuenco was that he was sentenced to an enhancement that was not charged and was not proved to the jury. Unlike Recuenco, petitioner was charged with a firearm enhancement and the evidence was sufficient to prove that enhancement. Recuenco provides some instruction for this case, but it is not controlling. Petitioner has failed to meet his burden, and this Petition must be dismissed. Grisby, 121 Wn.2d at 423.

D. IF THE SENTENCE IS REVERSED, THE APPROPRIATE REMEDY IS REMAND FOR THE STATE TO EMPANEL A JURY TO DECIDE WHETHER PETITIONER OR AN ACCOMPLICE WAS ARMED WITH A FIREARM.

> [W]here the defense has not specifically put the court on notice as to any apparent defects in his sentencing procedure, remand for an evidentiary hearing to allow the State to prove the belatedly disputed matters is appropriate.

State v. Jackson, 129 Wn. App. 95, 105, 117 P.3d 1182 (2005), review denied, 156 Wn.2d 1029 (2006) (citing State v. Ford, 137 Wn.2d 472, 485, 973 P.2d 452 (1999).

> In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, ... When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

State v. Vangerpen, 125 Wn.2d 782, 794, 888 P.2d 1177, (1995) (emphasis in the original), citing Burks v. United States, 437 U.S. 1, 15, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

Here, petitioner does not argue or show actual prejudice. Should this Court determine that petitioner met his burden, it should reverse the sentence and remand for re-sentencing. At the re-sentencing, the State would be entitled to present its evidence to a properly instructed jury. See State v. Walden, 131 Wn.2d 469, 471, 932 P.2d 1237, (1997) (error in self-defense instruction required reversing conviction and remanding for a new trial), State v. Mills, 154 Wn.2d 1, 4, 109 P.3d 415, (2005) (error in the to convict instruction required reversal and remand for a new trial).

Recuenco does not compel a different remedy. There, the State charged a deadly weapon enhancement and failed to prove the handgun was operable. The jury was instructed on – and found -- the deadly weapon enhancement. Under those circumstances, a re-hearing on the enhancement would violate double jeopardy. Burks v. United States, 437 U.S. at 18.

Here, double jeopardy would not be violated by a new sentencing hearing with the jury determining whether petitioner or an accomplice was armed with a firearm. State v. Ervin, 158 Wn.2d 746, 757, 147 P.3d 567 (2006).

E. WHEN A COURT FINDS TWO CRIMES CONSTITUTE THE SAME CRIMINAL CONDUCT, IT MUST SENTENCE THE DEFENDANT FOR BOTH OFFENSES, EVEN THOUGH THE SENTENCES RUN CONCURRENTLY.

The State agrees with petitioner that a firearm enhancement should not be imposed for a crime for which a defendant is not being sentenced. Petition 9. The State strongly disagrees with petitioner's argument, "Where a sentencing court finds

that two convictions encompass 'same criminal conduct,' however, these offenses must be 'counted as one crime' and the defendant is only sentenced for a single offense." Petition 9.

"When a person is convicted of a felony, the court shall impose punishment as provided in this chapter." RCW 9.94A.505(1).

> The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement.
>
> * * *
>
> (a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

RCWA 9.94A.533(3).

> Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or

> vehicular homicide even if the victims occupied the same vehicle.

RCW 9.94A.589(1)(a).

The language quoted above is clear and unequivocal. First, a person who is convicted of a felony must be sentenced for that felony. Second, the standard range is determined using all prior and current convictions. Third, for counting purposes, crimes that are found to be the same criminal conduct are not counted as a current or prior conviction in determining the offender score and the standard range. Fourth, every sentence where the defendant or a accomplice was armed with a firearm must have a firearm enhancement. Fifth, multiple firearm enhancements are served consecutively to each other and to any other sentence. State v. Callihan, 120 Wn. App. 620, 623, 85 P.3d 979 (2004).

Petitioner argues that since his crimes were the same criminal conduct, he was really only "sentenced for a single offense." Petition 9. This would only be true if the two crimes merged or conviction for both crimes violated double jeopardy.

The State may bring multiple charges arising from the same criminal conduct, and the jury may convict of all those charges. "Courts may not, however, enter multiple convictions for the same offense without offending double jeopardy." State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). The State argues, as it did in Mandanas that the two firearm enhancements did not violate double jeopardy.

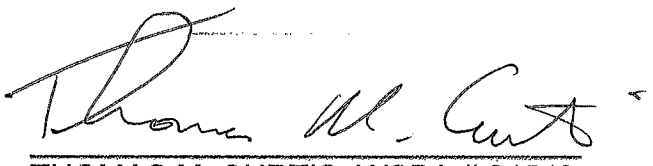
Petitioner does not argue that the two underlying crimes merge. In light of the unambiguous language of the statute, petitioner has not shown error. This petition should be dismissed.

VI. CONCLUSION

The personal restraint petition should be dismissed.

Respectfully submitted on September 30, 2008.

FOR JANICE ELLIS
Snohomish County Prosecutor



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